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CURRENT TOPICS.

The strictness with which courts have been accustomed to construe the contracts of carriers, seeking to limit their common-law liability, received a happy illustration in the recent decision of the English High Court, in the case of Goldsmith v. Great Eastern Railway Co. Clover seed consigned to the plaintiff by the defendant's railway was misdelivered by the defendants, and the plaintiffs did not receive it till after a fortnight's delay, too late for the season's market. The goods had been forwarded at the defendant's lower rate of charge, and therefore by special contract, "solely at the risk of the sender," with the exception of loss occasioned by the fraud or theft of the company's servants. It was contended, and successfully, that a misdelivery was not a danger which was to be understood in the use of the words "owner's risk." Said LINDLEY, J.: "The real and important question for us is whether the special contract applies to this case. The words are that the lower rate being paid, 'the goods are to be forwarded solely at the risk of the sender, with the exception' mentioned. Now the risk of the sender would apply only (as has been decided) to the loss or destruction of the goods, and not to mere delay, unless there is something in the exception to extend its meaning. * * * * There is nothing, it seems, in those exceptions to enlarge the generally received meaning of the word risk, and although I think it was more like ordinary carelessness than wilful default which caused the delay, yet it appears to me on the contract that the company can not resist the plaintiffs' claim in this action." See Lewis v. Great Western R. Co., 26 W. R. 14; Alexander v. Green, 7 Hill, 533; Moore v. Evans, 14 Barb. 524; Wells v. Steam Nav. Co., 8 N. Y. 375; Wallace v. Sanders, 42 Ga. 486; Nashville etc. R. Co. v. Jackson, 6 Heisk, 271; Lawson's Contracts of Carriers, Ch. VIII.

MALICIOUS PROSECUTION—THE ADVICE OF COUNSEL AS A DEFENSE.

In an action for malicious prosecution, it is incumbent on the plaintiff to show that in the prosecution of which he complains and for which he demands satisfaction in damages, the prosecutor in that case, and the defendant in this, acted maliciously and without probable cause. Other things he must show also, in particular cases, such as that the prosecution has terminated and that he was acquitted or discharged; but these two are absolutely essential in all suits of this character. It is not enough to prove one, *i. e.*, that he acted with malice, though with probable cause, or that he acted without probable cause and without malice, for both must concur. It follows, therefore, a *prima facie* case of want of probable cause being made, and malice being frequently inferrible therefrom, that upon the ability of the defendant to prove probable cause, actions of this character will generally depend. And a safe and generally conclusive mode for him to do this is to show that he acted in the matter upon the advice of counsel.

SNOW v. ALLEN,[1] decided at *nisi prius* by Lord Ellenborough in 1816, is one of the earliest cases in which the advice of counsel was presented as a defense. The action was for maliciously, and without reasonable and probable cause, suing out a writ of capias against the plaintiff, upon which he was arrested and imprisoned. The defendant, who was a tailor, had commenced an action against the plaintiff in which he obtained judgment for his debt and costs; but the plaintiff being absent from England, he took his bail in execution. Subsequently he sued out the writ against the plaintiff, and arrested him, the plaintiff's attorney having previously notified him that it was not competent to proceed against the plaintiff after he had taken the bail on execution; but the defendant's attorney, relying on a previous adjudication[2] and an opinion of a special pleader, persisted in his course; and the plaintiff was subsequently discharged by the King's Bench. The case coming on for trial, Lord Ellenborough asked: "How can it be contended here that the defendant acted maliciously? he

[1] 1 Stark. 502.

acted ignorantly." The attorney-general for the plaintiff replied: "He proceeded to arrest after full notice of the irregularity of his proceedings." But Lord Ellenborough said: "He was acting under what he thought was good advice: it was unfortunate that the attorney was misled by Higgins' Case;[2] but unless you show that the defendant was actuated by some purposed malice, the plaintiff can not recover," and he was non-suited. Said Mr. Justice Story in an early case[3] in this country: "It is certainly going a great way, to admit the evidence of any counsel that he advised a suit upon a deliberate examination of the facts, for the purpose of repelling the imputation of malice and establishing probable cause. My opinion, however, is that such evidence is admissible, although it is sometimes open to the objections stated in Hewlett v. Crutchley."[4] It will be likewise found that the rule while one not of great difficulty to expound, is subject to many exceptions, and that many novel questions have presented themselves to the courts in applying the law to the facts of particular cases.

In the case of Sommer v. Wilt,[5] which came before the Supreme Court of Pennsylvania in 1818, Duncan, J., said; "If this act had proceeded from ignorance or mistake of the law on a fair representation of facts to the attorney, I would not impute the honest mistake of a professor of the law to malice in the client; for here would be innocence which would strip the case of its malignant qualities, and would, as I rather incline to consider the law, be a defense in the action." In LeMaistre v. Hunter,[6] decided in the same State in 1851, Rogers, J., said: "The opinion of private counsel of a prosecution can not amount to proof of probable cause, nor prevent a recovery, unless the facts clearly warrant it, and are correctly and truly stated. Even the application to counsel and the opinion of counsel, in order to be available in the establishment of probable cause, must not be resorted to as a mere cover for the prosecution, but must be the result of an honest and fair purpose, and the statement made at the time must be fair and full, and consistent with that purpose." Woodward, J., in a still later case,[7] thought the words "unless the facts clearly warrant it," as used by Judge Rogers in Le Maistre v. Hunter, ill chosen and liable to misapprehension. What must the facts "clearly warrant"—the opinion of counsel, or the prosecution? Whichever was intended, this expression would make the defense depend on the soundness of the legal opinion. If the facts must clearly warrant the legal opinion, then the legal opinion, to be a defense, must be the judgment of the highest court, must be correct at all hazards; if the facts must clearly warrant the prosecution, then the professional opinion is useless. "No matter how candidly and faithfully a prosecutor has submitted the facts to his legal adviser and followed his advice, if they turn out insufficient for the support of the prosecution, he is liable to an action for malicious prosecution. On this principle every acquittal of a defendant would be followed by such an action. A qualification of the rule in terms like these destroys the rule itself. The law is not so. Professors of the law are the proper advisers of men in doubtful circumstances, and their advice, when fairly obtained, exempts the party who acts upon it from the imputation of proceeding maliciously and without probable cause. It may be erroneous, but the client is not responsible for the error. He is not the insurer of his lawyer. Whether the facts amount to probable cause is the very question submitted to counsel in such cases; and when the client is instructed that they do, he has taken all the precaution demanded of a good citizen."

The opinion in Walter v. Semple, very clearly states the law on the subject as far as it goes. It has been held in many States that the advice of an attorney, given after a full examination of the facts, will protect the prosecutor;[8] and this even though his opinion

[2] Higgins' Case, Cro. Jac. 320 (1614).
[3] Blunt v. Little, 3 Mason, 102 (1822).
[4] 5 Taunt. 277.
[5] 4 S. & R. 20 (1818).
[6] Bright. 495.
[7] Walter v. Semple, 25 Pa. St. 275 (1855).
[8] Chandler v. McPherson, 11 Ala. 916 (1847); Turner v. Walker, 3 G. & J. 380 (1831); Wood v. Weir, 5 B. Mon. 544 (1845); Skidmore v. Bricker, 77 Ill. 164 (1875); Wicker v. Hotchkiss, 62 Ill. 107 (1871); Fisher v. Forrester, 33 Pa. St. 501 (1859); Potter v. Searle, 8 Cal. 217 (1857); Lemay v. Williams, 32 Ark. 166 (1877); Soule v. Winslow, 66 Me. 447 (1876); Palmer v. Richardson, 70 Ill. 545 (1873); Davie v. Wisher, 72 Ill. 262 (1874); Phillips v. Bonham, 16 La. Ann. (1861); Gould v. Gardner, 8 La. Ann. 11 (1853).

may be incorrect, and his advice wrong,[9] provided they were understandingly given.[10]

The rule that the client must make a full disclosure of all the facts to his counsel is a radical one. "It appears to me," said Mr. Justice Story in an early case, "that a necessary qualification of the admission is that it should appear in proof that the opinion of counsel is fairly asked upon the real facts, and not upon statements, which conceal the truth or misrepresent the cause of action. If the law were otherwise, nothing would be more easy than to shelter the most malicious prosecution, under the opinion of counsel, honestly given, but under a total mistake of the facts. Probable cause of action, in the opinion of counsel, must depend upon the facts which are brought before him; and if the whole facts which are material to form such opinion, are not presented to the mind, how can the court say that he has given any opinion as to the true cause of action?"[11] Several cases illustrate the extent of this principle. In Ross v. Innis,[12] the plaintiff had been in the employment of the defendants, a mercantile firm, as cashier for four years. A charge was made against him of a debt due from his brother, and which the defendants claimed was to be paid by the plaintiff, and which they sought to set off against his salary. He denied any such agreement, and on leaving the concern, appropriated to the payment of salary due him, the sum of $166, out of moneys of the firm in his hands. There was a rule of the house that sums over five dollars paid to clerks should be paid only on checks drawn by one of the partners, but the plaintiff was not considered a clerk within this rule; and the rule even as to clerks was frequently violated. The defendants had the plaintiff arrested for embezzlement, after consulting one B, their attorney; but they did not, among other things, inform B either that the plaintiff was not considered an ordinary clerk, or that the rule had been often violated. "These," said the Supreme Court of Illinois, "were important facts, and should have been revealed to counsel. The whole truth, all the facts, should have been fully disclosed. As they were not, the defendants are not permitted to seek refuge under the advice given on a garbled statement of the facts." In a New York case, H took a wagon from the yard of S in the day time, claiming it as his own under a bill of sale from his brother C to him; and S, after being informed of his claim, had him arrested for stealing the wagon. It appeared that, previous to the arrest, S had stated that he had sold the wagon to C. S had purchased it from one M and paid part of the purchase-money, and C had afterwards paid the residue. C executed a bill of sale of it to H, the former having previously asked S to buy it of him, which S refused to do. Before making the complaint, S consulted counsel who advised him to prosecute, but S omitted to tell him of the bill of sale from C to H. The jury were instructed that if S, in making the complaint before the magistrate, acted upon the advice of counsel given upon a full and fair statement of the facts within his knowledge, this would be a defense to the action. A verdict was returned for the plaintiff which was affirmed on appeal.[13] In Thompson v. Lumley,[14] it appeared that the affidavits upon which the plaintiff's arrest was based were submitted to the district attorney, and he indorsed upon them that it was a proper case for the warrant to issue. But this was held not to protect the defendant, it being shown that there had not been a full disclosure in the affidavits of all the facts and circumstances. In Cooper v. Utterbach,[15] a witness, an attorney at law, having testified that the defendant had proceeded only after his advice as a lawyer to do so, the plaintiff asked him the following question: "You have stated that, with all the facts before you, you advised the defendant that the plaintiff had been guilty of obtaining money under false pretenses; please state what were the facts upon which that advice was based?" It was objected that as the correctness of the witness' opinion was not in issue in the case, nor the grounds on which he based it, the question was improper. But the court held otherwise; its object being to

[9] Bartlett v. Brown, 6 R. I. 37 (1859); Wills v. Noyes, 12 Pick. 324 (1832); Murphy v. Larson, 77 Ill. 172 (1875); Richardson v. Virtue, 2 Hun, 20 (1874); Eastman v. Keasor, 44 N. H. 518.

[10] Hall v. Hawkins, 5 Humph. 359 (1844); Clements v. Ohrly, 2 C. & K. 686 (1847).

[11] Blunt v. Little, 3 Mason, 102 (1822).

[12] 35 Ill. 487 (1864).

[13] Hall v. Suydam, 6 Barb. 83 (1849).

[14] 50 How. Pr. 105 (1875).

[15] 37 Md. 282 (1872).

test the good faith of the defendant, by ascertaining whether he had disclosed to his legal adviser all facts in his possession bearing on the guilt or innocence of the accused. It is not error to reject an offer by the defendant to prove that before commencing the prosecution, he consulted counsel; as this shows neither that he laid all the facts before him, nor that he advised it.[16] There must be no suppression, evasion or falsehood on the client's part, in stating his case to the attorney; he must not make the application as a mere cover for the prosecution.[17] It is important to note that the party must not omit to state every fact known to him, even though he honestly supposed it was not material;[18] and he must have divulged every fact which by reasonable diligence he might have ascertained;[19] it is not necessary that he shall have been grossly negligent in stating them.[20] So it has been held that the act of the defendant in carrying on an unfounded prosecution, will not be excused even where he was supported by his attorney's opinion, the latter, while giving it, having expressed doubt of its propriety,[21] and of course, where both counsel and client act in bad faith, it will be no defense.[22]

Good faith in acting upon the counsel's advice is as requisite as good faith in obtaining it. It does not follow, in every case, that because a party makes a full and correct statement of the case, as he honestly believes it, to his counsel, and receives his advice thereon, and thereupon acts upon it, his action is *bona fide*. It may generally be presumed to be so; but evideuce that after the advice he was informed of facts which should have satisfied him that the party whom he accused was not guilty, would destroy this presumption.[23] If under the advice of counsel, a person swears out a warrant against another, and before he causes his arrest, he ascertains his innocence of the charge, there is no principle on which he can be justified in proceeding, even though he was protected by professional advice in taking out the warrant.[24] If the party consult one attorney, who advises him to proceed, and he afterwards receives from another attorney whom he consults advice of a contrary kind, the first opinion will not avail him as a protection.[25] And so if he does not himself believe that he has any ground for his cause of action, the opinion of a lawyer that he has is irrelevant.[26]

Whether the prosecutor acted *bona fide* upon the opinion of his counsel, believing he had a good cause of action, is a question for the jury.[27] M, an army accoutrement maker, residing in London, had in January, 1822, made a contract with one D, an agent of the government of Columbia, to supply and ship to the latter a quantity of arms and accoutrements. M shipped the goods, and received from D certain debentures signed by D as agent of the Columbian government. When the goods arrived in South America, the government of Columbia repudiated the contract, alleging that D had exceeded his authority. In February, 1823, R arrived in England in the character of the accredited agent of the Columbian government, and to him M applied to acknowledge the contract with D, and to confirm the debentures, which he refused to do. A month later, M's attorney informed R by letter, that, by the laws of England, he was personally liable for the debt, and that if he did not satisfactorily arrange the matter, he would be proceeded against. In reply, R's attorney asked for copies of the contract between M and D, that he might form an opinion as to R's responsibility, and stated that R was not authorized either to confirm the contract or the debentures, and that the government of Columbia had disapproved of the contract, in consequence of D having gone beyond his authority. M's attorney refused to furnish the copies. M thereupon laid his

[16] Aldridge v. Churchill, 28 Ind. 62 (1867).
[17] Walter v. Semple, 25 Pa. St. 275 (1855).
[18] Hill v. Palm, 38 Mo. 13 (1866); Sharpe v. Johnston, 59 Mo. 557 (1875).
[19] Sappington v. Watson, 50 Mo. 83 (1872); Thompson v. Mussey, 3 Greenlf. 305 (1825); Stevens v. Fassett, 27 Me. 266 (1847); Galloway v. Stewart, 49 Ind. 156 (1874), Bliss v. Wyman, 7 Cal. 257 (1857); Hewlett, v. Crutchley, 5 Taunt. 277 (1813).
[20] Scotten v. Longfellow, 40 Ind. 25 (1872).
[21] Kendrick v. Cypert, 10 Humph. 291 (1849).
[22] Center v. Spring, 2 Iowa, 393 (1856); Sherburne v. Boardman, Sup. Ct. Wis., March, 4 (1881).
[23] Cole v. Curtis, 16 Mum. 182 (1870); Center v. Spring, 2 Iowa, 393 (1856); Stone v. Swift, 4 Pick. 389, 16 Am. Dec. 349 (1826).
[24] Ash v. Marlow, 20 Ohio, 119 (1851).
[25] Stevens v. Fassett, 27 Me. 266 (1847).
[26] Ravenga v. Mackintosh, 2 B. & C. 693 (1824)
[27] Hall v. Suydam, 6 Barb. 83 (1849); Potter v. Searle, 8 Cal. 217 (1887): Thompson v. Lumley, 50 How. Pr. 108 (1875): Anderson v. Friend, 71 Ill. 475 (1874).

case, and all his documents and papers, before a special pleader of considerable experience; asking an answer to the following questions: 1. Whether the Columbian government was bound by the contract made by D; 2. Whether R, who, at the time the contract was made, held the office of minister of foreign affairs in the Columbian goverment, was personally liable; 3. Whether, in the event of M causing R to be arrested, an action would lie at the suit of the latter for a malicious arrest in case it should turn out he were not liable. Upon this an opinion was given: 1. That the Columbian government was liable; 2. That R as a member of that government was personallv responsible; and 3d, that an action would not be maintainable by R against M for a malicious arrest,in case it should be decided that R was not personally liable. M thereupon made an affidavit that R was indebted to him in £90,000 for goods sold and delivered; and R was arrested in this suit. The proceedings were subsequently, before trial, discontinued by M. R then brought an action against M for malicious prosecution. Abbott, C. J., who presided at the trial, instructed the jury that if they were of opinion that at the time when the arrest was made, M acted truly and sincerely upon the faith of the opinion given by his professional adviser, that R was personally liable, and that he might be lawfully arrested, and that he, M, could recover, they should find for M; but that if they thought that M believed that he would fail in the action; that he intended to use the opinion as a protection in case the proceedings were afterwards called in question, and that he made the arrest, not with a view of obtaining his debt, but to compel R to sanction the debentures, they should find for R The jury found in favor of R with £250 damages. In the King's Bench, the instructions and verdict were held proper. "I accede to the proposition," said Bayley, J., "that if a party lays all the facts of his case fairly before counsel, and acts *bona fide* upon the opinion given by that counsel, however erroneous that opinion may be, he is not liable to an action of this description. A party however may take the opinions of six different persons, of which three are one way and three another. It is therefore a question for the jury whether he acted *bona fide* on the opinion, believing that he had a cause of action. The jury in this case have found, and there was abundant evidence to justify them in drawing the conclusion, that the defendant did not act *bona fide*, and that he did not believe that he had any cause of action whatever."[28] It is to be noted that here both malice and want of probable cause were established to the satisfaction of the jury—malice in not acting *bona fide* upon the advice given, and want of probable cause, on the facts in evidence.

The person upon whose advice the defendant acted must be shown to be a counselor or attorney at law. Thus the advice of a justice of the peace or a police justice has been held in several cases not to carry with it any protection.[29] "We do not feel at liberty to carry it further," said the Supreme Court of North Carolina, in Beal v. Robinson,[30] referring to Mr. Justice Story's statement of the rule in Blunt v. Little,[31] "by admitting testimony of the opinion of any gentleman, however respectable, who has not qualified himself for giving advice upon questions of law, by studying it as a science, and pursuing it as a profession. The persons, to consult whom it is the duty of a party, who conceives himself aggrieved and is about to institute a criminal prosecution, are gentlemen of the legal profession, and not those who, in point of qualification to advise upon such questions, stand no higher than that party himself." Said the Supreme Court of Missouri in 1844: "To permit the counsel of those whose capacity we have no means of judging, and who owe no responsibility to the courts, to be received as evidence, would lead to collusion, and furnish a ready defense in all actions like the present."[32] "The law wisely requires," it is said, in a Massachusetts case, "that a party who has instituted a groundless suit against another, should show that he acted on the advice of a person, who by his professional training and experience, and as an officer of the court, may be reasonably supposed to be competent to give safe and prudent

[28] Ravenga v. Mackintosh, 2 B. & C. 693 (1824).
[29] Sutton v. McConnell, 46 Wis. 269 (1879); Olmstead v. Partridge, 16 Gray, 381 (1860); Brooks v. Warwick, 2 Stark. 389 (1818); Straus v. Young, 36 Md. 246 (1872); Williams v. Van Meter, 8 Mo. 339 (1844); Burgett v. Burgett, 43 Ind. 78 (1873): Potter v. Casterline, 9 Cent L. J. 63 (1879);
[30] 8 Ired. 276 (1848).
[31] *Supra*.
[32] Williams v. Van Meter, 8 Mo. 339 (1844).

counsel, on which a party may act honestly and in good faith, although to the injury of another. But it would open the door to great abuses of legal process, if shelter and protection from the consequences of instituting an unfounded prosecution could be obtained by proof that a party acted on their responsible advice of one who could not be presumed to have better means of judging of the rights and duties of the prosecutor on a given state of facts, than the prosecutor himself."

It is said in a Pennsylvania case, that it is important that the defendant should have resorted for advice to a professional adviser of competency and integrity.[33] But competency and integrity are presumed, where he is shown to be a duly qualified and licensed attorney. In Horne v. Sullivan,[34] the defendant relying for protection on professional advice, the court instructed the jury that it was not enough that the person thus consulted was a lawyer, but that the defendant must prove that he was a man learned and skilled in his profession. In the Supreme Court this was held erroneous. "In order to practice as an attorney at law in this State," said Sheldon, C. J., "a license must be obtained from the Supreme Court of the State, which, as a general rule, is granted upon public examination before the court as to qualification. An attorney thus licensed to practice the profession of law in the community, with such a voucher of his legal knowledge, may be reasonably supposed to be competent to give legal counsel, and to justify resort therefor to such a source." But it is essential that the adviser be a licensed attorney. In Murphy v. Larson,[35] the party to whom the defendant applied for advice, had an office, held himself out as an attorney-at-law, and transacted considerable business before justices of the peace. The defendant consulted him in good faith, believing that he was an attorney-at-law, competent to give advice in legal matters; but he was in fact not a duly licensed attorney. It was held that the fact that he had consulted this person, might be given in evidence on the question of malice and in reduction of exemplary damages, but was no bar to either the action or to actual damages.

So in Stanton v. Hart,[36] the defendant was a "pettifogger," a farmer with no legal training, who frequently appeared for parties in justices' courts. His advice was held to be no protection. Said Campbell, J.: "The law allows honest action upon the advice of counsel who have been fully informed on the facts, to be a complete justification upon the sole ground that a person has done all he could be expected to do to enable him to act safely. But it is not the policy of the law to permit innocent men to be subjected to false charges and unfounded arrests, and a person who assumes to prosecute is bound to use all reasonable means to avoid committing such a grievance. Every man of common information is presumed to know that it is not safe, in matters of importance, to trust to the legal opinions of any but recognized lawyers; and no matter is of more legal importance than private reputation and liberty. When a person resorts to the best means in his power for information, it will be such a proof of honesty as will disprove malice, and operate as a defense proportionate to his diligence. But there is no respectable authority for holding that advice from any but a qualified lawyer is of itself an answer to the charge of malicious prosecution, however honest the course of the party may have been in seeking for it. Such advice bears upon probable cause, while the other excuses go to disprove malice. It would be very dangerous to relax the rules on this subject. There can never be any difficulty in finding professional advisers under ordinary circumstances. And where the prosecution complained of is criminal and not civil, there is still less cause for removing any safeguard against oppressive and vexatious proceedings. This rule originated in England, where there is no public prosecutor, and where all complaints must usually be made by private parties. They were compelled to employ counsel to prosecute, and it would have been unjust to compel them to do more than use proper diligence and fairness in choosing and instructing them. But under our system, all prosecutions are put under official control, and a principal reason for this was the abuse of private prosecutions which are very apt to be set on foot for private purposes rather than for public good. It can rarely happen that

[33] Walter v. Semple, 25 Pa. St. 275 (1855).
[34] 83 Ill. 30 (1876).
[35] 77 Ill. 172 (1875).
[36] 27 Mich. 539 (1873).

in serious cases, where there is any such doubt as would render it prudent to seek advice before acting, it will not be easy to get access to the prosecuting attorney. The very fact that a person is in doubt, should teach him more caution, and lead him to communicate with the proper authorities, and put the care of the prosecution where it legally belongs. There is no need in such cases to rely on irregular advisers, and it is a practice not to be favored." What is said in Horne v. Sullivan,[37] as to the presumption of capacity in a licensed attorney, would obviously not apply in those States where citizenship and good moral character are all the requirements for admission to the bar.[38] In an Indiana case it was held not erroneous to charge that, in order to protect himself, the defendant must have consulted a "practising attorney."[39]

A city alderman, being a conservator of the peace in Pennsylvania, is held in that State to be a proper party to give advice of this character, and such advice, when followed, will protect the defendant.[40] So, where a collector, by the advice of the United States District Attorney, instituted suit against the plaintiff, it was held that such advice was probable cause;[41] and it was said in Laughlin v. Clarkson:[42] "If the officers of the State, who are appointed on account of their legal learning, consider that a given state of facts is sufficient evidence of probable cause, how can the private citizen be said to be in fault, in acting upon such facts, and how can the State condemn him to damages for so doing? To decide so, is to use the machinery of government as a trap to ensnare those who trust in government in such matters, and who ought to trust in it. If such officers make a mistake, it is an error of government itself, and government can not allow the citizen to suffer for his trust in its proper functionaries."

In a very recent Maine case,[43] a point was presented which does not appear to have been made in any of the earlier cases, and it was held that advice of an attorney interested in the action did not protect the party against the charge of malice. As very conclusively put by the court, the grounds upon which the opinion of an attorney can be shown as probable cause, are that he is an officer of the court held out to the public as learned in the law, and that the client has a right to presume that he will give him a fair, unbiased and well-grounded opinion. But if the attorney be interested in the suit to the knowledge of the client, the latter has no right to presume that he will give him an unbiased opinion. If he acts upon it, and it turns out to be erroneous, he can not complain; for he knew he had not consulted a disinterested attorney. A judge or a juror, interested in a case, is not competent to sit on its trial; and the opinion of an attorney under such circumstances is entitled to no greater respect than the decision of such a judge. As well might an attorney, a defendant himself in an action for malicious prosecution, justify on the ground of probable cause by satisfying the jury that, as a lawyer, he believed he had a good cause of action.

The advice and opinion of counsel must be given before the commencement of the proceeding; given afterwards, they are of no avail to protect him. "I think," said Mr. Justice Story, in Blunt v. Little,[44] "it ought not to be permitted to any person, after the commencement of his suit, to repel the imputation of malice or prove probable cause by subsequently getting the opinions of counsel in his favor. What would this be, but to encourage unfounded suits and to enable parties to get rid of the effects of their own misconduct by matters *ex post facto*? What constitutes probable cause of action is, when the facts are given, matter of law, upon which the court is to decide; and it can not be proper to introduce certificates of counsel to establish what the law is. If the party acts upon the advice of counsel, however mistaken in commencing his suit, and is honestly misled, there is some ground to excuse his act. But when he has gone on without such advice, and in point of law has no probable cause of action, it is, I think, conceding too much to allow the subsequent opinion of counsel to change the legal rights of the parties."

[37] *Supra*.

[38] This point was suggested by the court in Stevens v. Fassett, *ante*.

[39] Burgett v. Burgett, 43 Ind. 78 (1873).

[40] Thomas v. Painter, 10 Phila. 409 (1875); Rosenstein v. Feigel, 6 Phila. 532 (1868).

[41] Murray v. McLane, 2 Car. Law Rep. 186.

[42] 27 Pa. St. 330 (1856).

[43] White v. Carr, 71 Me. 558 (1880).

[44] 3 Mason, 102 (1822).

The advice of counsel will protect the defendant only where the questions submitted to him are questions of law, or questions involving some legal principle. Where they are simply questions of fact or inference, the case is different; for the attorney is, as to these, no more capable of advising than his client is. Thus in Laird v. Taylor,[45] the plaintiff and defendant, who resided in the town of Y, on the 20th of March went to the City of S, fourteen miles distant, to attend a trial as witnesses, remaining there during the night and until the following evening, and returning together. On the night of the 20th, one C, a man in the defendant's employ, went, by his directions, to the village of M, near the Town of Y, to meet the defendant. At M he hitched his team under a shed for some time, but the defendant not coming by the train, he returned home, discovering after his return that the check reins had been purloined while the team was in the shed. Four months afterwards, the defendant discovered on the plaintiff's horses, which a workman was driving, a pair of check-reins which he declared were his, but made no effort to take them. A few days later, the defendant made application to a justice of the peace for a warrant to apprehend the plaintiff, saying that he knew the plaintiff did not steal the property, because he was in the City of S with him at the time. The justice had previously, on his application, issued a search warrant, and the check-reins which the defendant claimed, were found in the plaintiff's stable, hanging near an open door. Prior to the issuing of the warrant, defendant had stated to P, the constable, that he was going to arrest the plaintiff, "and have satisfaction or some fun, and bring him up before the public;" also that the justice would not arrest him without his swearing that plaintiff had stolen the property, and this he would not do, as he was with him at S at the time. Subsequently, defendant claimed that he had "got more light;" that he had seen an attorney; and he made an unqualified affidavit that he suspected the plaintiff of stealing his property. The plaintiff was thereupon arrested, and afterwards acquitted and discharged. In an action for malicious prosecution, the defendant endeavored to justify on the ground that he had proceeded under the advice of counsel. The trial court refused to instruct the jury that the defendant was protected by the advice of counsel, and a verdict for the plaintiff was affirmed on appeal. The Supreme Court laid it down that advice of counsel would not of itself protect a client, but that to enable it to have that effect, the question must be one of law, or some legal principle must be involved. In this case, the question for the defendant to determine was, whether the plaintiff took the property. This he knew was impossible, and the court could not say that the question involved any legal point proper to be submitted to counsel.

It is provided by statute in some States, that "clients shall not be relieved from their liability to damages and penalties imposed by law, on the ground that they acted under the advice of their counsel, but are entitled to redress from them for unskillful advice." This provision in Georgia renders the advice of counsel of no protection to the defendant in a suit for malicious prosecution; nevertheless it is a circumstance tending to show the absence of malice and the existence of probable cause: and as such, the fact is admissible in evidence, and should be left to the jury to be weighed by them with the other facts in the case.[46]

JOHN D. LAWSON.

[45] 66 Barb. 139 (1868).

[46] Fox v. Davis, 55 Ga. 298 [1875].

WAS DEATH BY WRONGFUL ACT, DEFAULT OR NEGLIGENCE ACTIONABLE AT COMMON LAW? IF SO, BY WHOM COULD THE ACTION BE BROUGHT?

In the September number, 1880, of the *Southern Law Review*, an article was published in which the author undertook to give the law on this subject. We dissent from the conclusion reached by him.

The leading case on this point—the one from which the law up to this time has been drawn—is Baker v. Bolton, 1 Campbell, 493, decided by Lord Ellenborough. It is also claimed that this case is the first one known to the English Law in which the point came directly before the court for trial and judgment. The facts are as fhllows: It was an action for damages against the proprietors of a stage coach in which plaintiff and his wife were traveling; coach was overturned; both were injured; the wife died from her injuries, hence this suit. Lord Ellenborough said: "The jury could only take into consideration the bruises

which the plaintiff had himself sustained, and the loss of his wife's society, and the distress of mind he had suffered on her account from the time of the accident till the moment of her dissolution. In a civil court, the death of a human being could not be complained of as an injury, and in this case the damages as to plaintiff's wife must stop with the period of her existence."

That is the entire opinion. The point did not come up again until in 1873, in Osborn v. Gillett, Law Reports Exchequer Cases, vol. 8.

Justice Bramwell, in commenting upon Lord Ellenborough's opinion, says—no argument is stated, no authority is cited—refers to the query of the reporter, and asks why should the answer to it be yes, as the defendant contends? He then refers to Higgins v. Butcher, Yelverton, 89, and says that the plaintiff did not, by his pleading, show any damage to himself. The same comment was made by him upon White v. Spittyne, 13 M. & W. 603. This distinguished justice then commented *in extenso* on a Kentucky case, 14 B. M. 204, which had followed Baker v. Bolton. The justice then says, "he does not understand death so caused should be a public wrong; nor does he know why the remedy for the private loss should merge in it. The principle is broad, plain and clear, that plaintiff has sustained damages from a wrongful action for which defendant is responsible; that the defendant, to establish his exception to this rule, should show a clear and binding authority, either by express decision or a long course of uniform opinion deliberately formed and expressed. I find no semblance of authority on that side of the Atlantic, except Baker v. Bolton, and the cases from America are founded on that case and some vague notion of a merger in a felony." Smith on Master and Servant, 3d edition, p. 139, assumes it to be certain that the action will lie. "In my opinion the plaintiff is entitled to judgment."

I wonder if Judge Cooley had seen this opinion when he wrote his book on Torts, in which he says (page 15), "the concurrence of authority was unanimous." Judge Ware decided in Plummer v. Webb (Ware, 75), that the private wrong did not at common law merge into the felony, and that the action could be maintained after the death of the child, though it was caused by battery. It certainly can not be claimed that Baker v. Bolton is any longer so binding in England, that there is yet a slavish obedience to its dogmatic assertion of a wrong principle. This case of Osborn v. Gillett, decided in 1873, certainly dissents from Baker v. Bolton, as far as Justice Bramwell could possibly dissent.

What was the view taken of this subject in the Saxon period? We quote from Crabb's History of the Law: "Appeals took their rise from the practice which prevailed among the Saxons and other people, of considering all offenses as private injuries which might be compensated for by the payment of a fine." Page 321. "As limitation to the action by appeal was fixed at a year and a day, it was common to wait till its expiration before filing an indictment." So many evils sprang up from this custom that a statute was passed by which "it was ordained that the suit by indictment might be taken at any time within the year and day as after, not prejudicing, nevertheless, the parties' suit." Id. p. 444. This statute was passed in Henry VIII's time. See Reeve, vol. 3, p. 109. "In this manner was every offense considered in the light of a civil injury, and the object of the laws was to repair the fault, rather than to punish the offender. There was, therefore, no distinction made between things done with deliberate malice, and those done in the heat of passion, or by inadvertence—a kind of levity which, however admissible in a rude and simple state of society, was soon found to be inadequate to the purposes of good government. Subsequent legislators, therefore, added other penalties and punished crimes, not merely as private injuries, but as public offenses." Page 39. "For this reason (retaliation being a characteristic of the Saxon, and to moderate and regulate their passions, rather than to suppress them), we find they adopted the principle of compensation for every personal injury whatever, even to the taking away of life." Page 37.

In Sullivan's Lectures on the English Law, vol. 1, p. 117, we find this statement: "Murder, therefore, like other lesser crimes, was atoned among those people, as it was among the ancient Greeks—namely, by a satisfaction of cattle, corn or money to the persons injured—that is, to the next of kin to the deceased, with a fine to the king or lord as an acknowledgment of his offense, and to engage the society to protect him against the future attempts of the party offended. These satisfactions were not regulated originally, nor fixed at any certain rate, but were left to the discretion of the injured or next of kin," limited only by his inability to refuse a reasonable one. From Bracton (using the edition by Sir Travers Twiss, D. C. L., Q. C., and issued in 1879, under authority of the English government), we quote: "Likewise we must see who are entitled to bring actions which arise out of a tort, and against whom. But an action under the Aquilian Law for men slain or wounded feloniously, will be allowed to near relations, or to strangers bound to them by homage or by service, so that they have an interest to bring an action. Chapter 4 of Actions, vol. 2, page 145, ch. 36, p. 545, upon minor and lighter charges which are brought civilly." Now, however, we may speak of minor and lighter charges which are brought civilly, as concerning actions for personal injuries, and they appertain to the Crown, for sometimes they are against the peace of the Crown. It is to be seen, therefore, what is an injury, and it is to be known that an injury is whatever is done not rightfully; and it has been said above in part, that if any one be slain we must see whether he has been slain injuriously, or is such an one as is slain with no right. There-

fore, he who kills a larcener by day or by night is not liable, if he otherwise could not escape danger, but he is liable if he could. Likewise he is not liable if he kills him through ill fortune, and not with the intention or the desire of killing him, and neither deceit nor fault of which we spoke above is found in him, and through the favor of the sovereign he is treated more mildly when this is proved. What is the Aquilian law? Our investigations lead us to adopt the facts as stated in Sandars' Institutes of Justinian, p. 502, title 3, De Lege Aquilia (English edition, 1869, Longmans, Green & Co.), because we find them sustained by the result of all the authorities. The law took its name from its proposer, the tribune Aquilius, and was passed at the time of the secession of the Plebs in the year 468, A. U. C. It made an alteration in all the previous laws, including those of the Twelve Tables, which had treated of damage wrongfully done (*de damno injuria*). A fragment of Gaius, in the Digest, contains the terms of the first head of the law which it is needless to quote here.

Under this law a person was made liable, who had killed a slave or animal by accident, provided he was in fault, for it punished fault as well as wilful wrongdoing.

Under it a physician was made liable, who killed a slave by an unskilful operation, or by giving the wrong medicine. Under it a muleteer, who through want of skill could not manage his mules and ran over your slave, was made liable; the master being sued in the first place for the negligence of his agent. Under it the master of the slave might bring his private action for the damage in the loss of the slave, and also a capital action against the murderer. Under the terms of this third head of this law, a person was liable for every other damage, if there was wrongful injury or fault in what he did.

A careful examination of the examples of the causes of actions under this law does not carry it to the length stated by Bracton. It was not given to relatives for the damage caused by the death of their kin. Originally it only gave a right of action to one whose property (slaves or animals) had been killed by fault or unskilfulness; but as soon as it is applied by English jurists and judges, it covers all accidents causing death by unskilfulness, fault or wrongful negligence of another, the right of action being given for these accidents to those that "have an interest to bring an action." And Bracton describes them to be "near relatives," "or strangers bound to them by homage or by service, so that they have an interest to bring an action." Under the law originally, the action was in the owner of the property, slave or animal killed. Who were near relatives was a question easy to be determined—father, mother, brother, sister—one who, so to speak, had an insurable interest in the life which arose out of blood kinship, and not from pecuniary obligations, as the ground of that interest, which would of course exclude uncles, aunts and cousins.

This change in the law as applied in England will justify a cursory glance at Bracton's position as an authority upon and guide to the English common law.

Guterbock, in his work on Bracton and his relations to the Roman law, translated by Brinton Coxe, and published by Lippincott & Co. in 1866, says that no inconsiderable part of the Roman law was applied in his day, and was one of the sources of the English common law; that he faithfully and fully reflects the condition of the common law in his time, and that he has given a place to only those elements or portions of the Roman law, which he found in England were actually valid law—such as were actually received and had operation as law; that he is the truest and best authority for the common law, and gives the sources for many legal truths which are now existing law. See pages 14, 17, 57 and 74; and of the same opinion is Reeve in his History of the English Law, and Spence in his learned work on Equitable Jurisdiction. Under the common law, the action for damage in these cases, arising from the causes under discussion, was called an appeal. It was the party's private action seeking revenge or damage for the injury done him, and at the same time prosecuting for the Crown in respect of the offense against the public. The appeal of death was a vindictive action which the law gave a wife against her husband's murderer, and to the heir at law against one who killed his ancestor. Bacon's Abridgement, vol. 1, subject, Appeal. The first edition of Bacon appeared in 1736. The action was in active use, common in the courts of England, and in no wise dependent upon the indictment growing out of the public offense when Blackstone delivered his lectures. See vol. 4, p. 314. Lord Ellenborough delivered his judgment in Baker v. Bolton in 1808. We think it hardly necessary to pile up authorities on this point, but we would have enjoyed some pleasure in asking Lord Ellenborough if he had ever read Justinian or Bracton or Bacon, or had heard or read Blackstone. It is quite a safe rule that the most dogmatic judges are, as a rule, very uncertain and incorrect as authorities.

Death by wrongful default, act or negligence, was actionable at common law, as the law stood in the year 1758, when Blackstone delivered his lectures, and the right of action was in favor of the wife and heir at law, or any others having an interest in the life of the person killed.

FONTAINE T. FOX, Jr.

REMOVAL OF CAUSES—CITIZENSHIP.

BARNEY v. LATHAM.

Supreme Court of the United States, October Term, 1880.

The second clause of the second section of the removal act of March 3, 1875, which declares that "when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the Circuit Court of the United States for the proper district," construed, and *held* to mean that the entire suit is removed when one or more of the parties actually interested in such separable controversy files the proper petition and bond for removal. Such right is not affected by the fact that a defendant, who is a citizen of the same State with one of the plaintiffs, may be a proper, but not an indispensable party to the separable controversy between the citizens. The right of removal, if claimed in the mode prescribed by the statute, depends upon the case disclosed by the pleadings as they stand when the petition for removal is filed.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Mr. Justice HARLAN delivered the opinion of the court:

This case involves the construction of the second clause of the second section of the act of March 3, 1875, c. 137, determining the jurisdiction of the circuit courts of the United States, and regulating the removal of causes from the State courts. It was commenced by a complaint filed in one of the courts of the State of Minnesota. The plaintiffs are William H. Latham and Edward P. Latham, citizens, respectively, of Minnesota and Indiana. The defendants are Ashbel H. Barney, Jessie Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Wm. G. Fargo, N. C. Barney, Charles T. Barney, citizens of New York; Angus Smith, a citizen of Wisconsin; Benjamin P. Cheney, a citizen of Massachusetts, and the Winona and St. Peter Land Company, a corporation organized under the laws of Minnesota.

The complaint is very lengthy in its statement of the grounds upon which the suit proceeds, but the facts, so far as it is necessary to state them, are these: The Territory and State of Minnesota received, under various acts of Congress, lands to aid in the construction of railroads within its limits. Act of March 3, 1857, 11 Stat. 195; Act of March 3, 1865, 13 Stat. 526; Act of July 13, 1866, 14 Stat. 97. The benefit of the grants from the government was transferred by the State to the Winona and St. Peter Railroad Company, a corporation created under its own laws, with authority to construct a road from Winona westerly by way of St. Peter in that State. Prior to October 31, 1867, the individual defendants already named (except N. C. Barney and Charles T. Barney), together with Charles F. Latham and Danforth N. Barney (both of whom died before the commencement of this suit), had, under a contract between them and that company, constructed 105 miles of the proposed road, whereby the latter became entitled to several hundred thousand acres of the lands granted by Congress to the State. On the day last named those persons entered into a written contract with the company, whereby the latter, among other things, agreed, in consideration of its indebtedness to the former, to sell and convey to them such lands as it should receive from the State by reason of the construction of the 105 miles of road, excepting so much thereof as was necessary for tracks, right of way, depot grounds, and other purposes incidental to the operation of the railroad. Of the moneys advanced and used in construction, Charles F. Latham contributed one thirty-seventh, and to that extent, it is claimed, he was entitled, in equity, to an undivided one thirty-seventh of the lands earned. The company, prior to October, 1870, received from the State conveyances of lands to the extent of 364,154 acres, which quantity was increased to 617,510 acres by a deed from the State, of date February 26, 1872; and, on May 30, 1874, it received a further conveyance for more than 500,000 acres. Up to the end of the year 1869, the railroad company made numerous sales, on long time, and in small quantities for actual settlement. Charles F. Latham died in October, 1870, seized and possessed, it is contended, of the equitable title to the undivided one thirty-seventh of the lands earned. He left nine heirs-at-law, among whom are the plaintiffs. The defendant Ashbel A. Barney, acting for his associates, had a settlement with those heirs in reference to the sales of lands, and procured releases from them, which are averred to have been fraudulent and void as to present plaintiffs. The facts averred in support of that charge need not be here detailed. They are fully set forth in the complaint. The surviving associates of Charles F. Latham, together with N. C. Barney and Charles F. Barney, heirs-at-law of D. N. Barney, deceased, without the knowledge and consent of plaintiffs, incorporated themselves under the general laws of the State of Minnesota, as the Winona and St. Peter Land Company, to which, by their direction, the railroad company conveyed, and by which were thereafter managed, all the lands remaining unsold. The plaintiffs claimed that the individual defendants owed them, as heirs of Charles F. Latham, the further sum of $3,500, on account of sales of land made both prior to his death and subsequently thereto, up to the time when the title to the lands was conveyed to the land company. The individual defendants repudiated the claim of plaintiffs to any further sum on that account, and the land company refused to recognize the claim of plaintiffs to an interest in the unsold lands.

The specific relief asked for is: 1. That the individual defendants be required to account to plaintiffs for the amount of all moneys which

came to their hands from the sales of land prior to the death of Charles F. Latham, and pay over to plaintiffs the sum of $3,500, or such other sum as shall be found, on an accounting, to be due them as their share thereof; also such amounts as might be due them out of the sums received by Ashbel H. Barney, from purchasers subsequently to the death of Charles F. Latham. 2. That the plaintiffs be adjudged to be the owners of two-ninths of one thirty-seventh part of all unpaid contracts and securities in the hands of the land commissioner of the company; that the land company be required to account with plaintiffs for all lands sold by it subsequently to the conveyance from the railroad company, and convey to them an undivided two-ninths of one thirty-seventh of all the unsold lands.

The individual defendants answered, and put in issue all the material allegations of the complaint. The land company, in its answer, admits the conveyance by the railroad company to have been without any consideration by it paid: that the stock therein is all held by its co-defendants and the heirs or personal representatives of D. N. Barney; and that if the relief prayed for against the other defendants be granted, the company is liable to and should account to plaintiffs as asked in their complaint. It consented that the matters and facts established and proven as against its co-defendants may be considered as established and proven against it, and such judgment accordingly entered as might be equitable and proper. Upon the petition, accompanied by a proper bond, filed by the individual defendants, the State court entered an order that it would proceed no further in the suit. But, upon motion of plaintiffs, the circuit court remanded the suit to the State court, upon the ground that it was not removable under the act of Congress. Is this suit removable upon the petition of the individual defendants, citizens of New York, Wisconsin and Massachusetts? Does the fact that the land company, one of the defendants, is a corporation of Minnesota, of which State one of the plaintiffs is a citizen, prevent a removal of the suit to the circuit court of the United States?

The answer to these questions depends upon the construction which may be given to the second section of the act of March 3, 1875. We will be aided in our construction of that act by recalling as well the language, as the settled interpretation of previous enactments upon the subject of removal of causes from State courts. The act of Sept. 24, 1789, ch. 20, gives the right of removal to the defendant in any suit, instituted by a citizen of the State in which the suit is brought against a citizen of another State. According to the uniform decisions of this court, it applied only to cases in which all the plaintiffs were citizens of the State in which the suit was brought, and all the defendants citizens of other States. It made no distinction between a suit and the different controversies which might arise therein between the several parties; that is, Congress, when authorizing the removal of the suit, did not permit any controversy therein between particular parties to be carried into the Federal court, leaving the remaining controversies in the State court for its determination. If the whole suit could not be removed, no part of it could be taken from the State court.

Thus stood the law until the act of July 27, 1866, ch. 288, which provided (omitting such portions as have no bearing upon the present question) that "if in any suit * * * * in any State court * * * by a citizen of the State in which the suit is brought against a citizen of another State, * * * * a citizen of the State in which the suit is brought is or shall be a defendant, and if the suit, so far as relates * * * * to the defendant who is a citizen of a State other than that in which the suit is brought, is or has been instituted or prosecuted for the purpose of restraining or enjoining him, or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then, and in every such case * * * the defendant who is a citizen of a State other than that in which the suit is brought, may, at any time before the trial or final hearing of the cause, file a petition for the removal of the cause as against him into the next circuit court of the United States, to be held in the district where the suit is pending, and offer good and sufficient security for his entering in such court * * * * copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in said cause affecting or concerning him, and also for his there appearing; * * * and it shall be thereupon the duty of the State court to accept the surety, and proceed no further in the cause as against the defendant so applying for its removal, * * * * and the said copies being entered as aforesaid in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process against the defendant who shall have so filed a petition for its removal as above prescribed. * * * * And such removal of the cause, as against the defendant petitioning therefor, into the United States court, shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the State court, as against the other defendants, if he shall desire to do so." 14 Stat. 306.

This provision is explicit, and leaves no room to doubt what Congress intended to accomplish. It proceeds, plainly, upon the ground, among others, that a suit may, under correct pleading, embrace several controversies, one of which may be between the plaintiff and that defendant who is a citizen of a State other than that in which the suit is brought; that to the final determination of such separate controversy the other defendants may not be indispensable parties; that, in such a case, although the citizen of another State, unde

the particular mode of pleading adopted by the plaintiff, is made a co-defendant with one whose citizenship is the same as the plaintiff's, he should not, as to his separable controversy, be required to remain in the State court, and surrender his constitutional right to invoke the jurisdiction of the Federal court; but that, at his election, at any time before the trial or final hearing, the cause, so far as it concerns him, might be removed into the Federal court, leaving the plaintiff, if he so desires, to proceed, in the State court, against the other defendant or defendants. When there were several defendants to that separable controversy, all of whom are citizens of States other than that in which the suit was brought, they could unite in claiming the removal of such controversy.

Next came the act of March 2, 1867, ch. 196, which allows the citizen of the State other than that in which the suit was brought, whether plaintiff or defendant, upon the proper affidavit of prejudice or local influence, filed before the final hearing or trial of the suit, to remove the suit into the Federal court. 14 Stat. 558. It was construed in Case of the Sewing Machine Companies (18 Wall. 553), as allowing a removal, upon such an affidavit, only where there is a common citizenship upon each side of the controversy raised by the suit; that is, all on one side being citizens of the State in which the suit is brought, while all on the other side are citizens of other States. In that case the plaintiff and one of the defendants were citizens of the State where the suit was brought, while two of the defendants were citizens of other States. It was ruled that whatever was the purpose of the act of 1866, as to the particular case therein provided for, Congress did not intend, by the act of 1867, to give to parties, who are citizens of States other than that in which the suit is brought, the right of removal, upon the ground of prejudice or local influence, when their co-defendants or co-plaintiffs, as the case might be, are citizens of the same State with some of the adverse parties. The court there evidently had in mind the case where the presence in the suit of all the parties, on the side seeking the removal, was essential that complete justice might be done, and not a suit in which there was a separable controversy, removable under the act of 1866.

We come now to the act of March 3, 1875, ch. 137, the second section of which is in these words: "That any suit of a civil nature at law or in equity now pending or hereafter brought in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, * * * in which there is a controversy between citizens of different States, * * * either party may remove said suit into the circuit court of the United States for the proper district; and when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the circuit court of the United States for the proper district." 18 Stat. pt. 3, 470. We had occasion to consider the meaning of the first clause of this secton in Removal Cases, 100 U. S. 468. Disregarding as immaterial the mere form of the pleadings, and placing the parties on opposite sides of the real matter in dispute, according to the facts, we found that the only controversy there was between citizens of Ohio and Pennsylvania on one side, and certain corporations created under the laws of Iowa on the other. And we held that if, in arranging the parties upon the respective sides of the real matter in dispute, all those on one side are citizens of different States from those on the other, the suit is removable under the first clause of the second section of the act of 1875—those upon the side seeking a removal uniting in the petition therefor. Whether that suit was not also removable under the second clause of that section, we reserved for consideration until it became necessary to construe that part of the statute. The present case imposes that duty upon us. We may remark that with the policy of the act of 1875 we have nothing to do. Our duty is to give effect to the will of the law-making power, when expressed within the limits of the Constitution. We are of opinion that the intention of Congress, by the clause under consideration, was not only to preserve some of the substantial features or principles of the act of 1866, but to make radical changes in the law regulating the removal of causes from State courts. One difference between that act and the second clause of the second section of the act of 1875 is, that whereas the former accorded the right of removal to the defendants who were citizens of a State other than that one in which the suit was brought—if between them and the plaintiff or plaintiffs there was, in the suit, a controversy finally determinable as between them, without the presence of their co-defendants, or any of them, citizens of the same State with plaintiffs—the latter gave such right to any one or more of the plaintiffs or the defendants actually interested in such separate controversy. Both acts alike recognized the fact that a suit might, consistently with the rules of pleading, embrace several distinct controversies. But while the act of 1866, in express terms, authorized the removal only of the separable controversy between the plaintiff and defendant or defendants seeking such removal—leaving the remainder of the suit, at the election of the plaintiff, in the State court—the act of 1875 provided, in that class of cases, for the removal of the entire suit. That such was the intention of Congress, is a proposition which seems too obvious to require enforcement by argument. While the act of 1866 expressly confines the removal to that part of the suit which specially relates to or concerns the defendant seeking the removal, there is nothing whatever in the act of 1875 justifying the conclu-

sion that Congress intended to leave any part of a suit in the State court where the right of removal was given to, and was exercised by, any of the parties to a separable controversy therein. Much confusion and embarrassment, as well as increase in the cost of litigation, had been found to result from the provision in the former act permitting the separation of controversies arising in a suit, removing some to the Federal court, and leaving others in the State court for determination. It was often convenient to embrace in one suit all the controversies which were so far connected by their circumstances as to make all who sue, or are sued, proper, though not indispensable parties. Rather than to split up such a suit between courts of different jurisdictions, Congress determined that the removal of the separable controversy to which the judicial power of the United States was, by the Constitution, expressly extended, should operate to transfer the whole suit to the Federal court.

If the clause of the act of 1875, under consideration, is not to be thus construed, it is difficult to perceive what purpose there was in dropping those portions of the act of 1866 which, *ex industria*, limited the removal, in the class of cases therein provided for, to that controversy in the suit, which is distinctively between citizens of different States, and of which there could be a final determination without the presence of the other defendants as parties in the cause.

It remains only to inquire how far this construction of the act of 1875 controls the decision of the case now before us. The complaint, beyond question, discloses more than one controversy in the suit. There is a controversy between the plaintiffs and the Winona and St. Peter Land Company, to the full determination of which the other defendants are not, in any legal sense, indispensable parties, although, as stockholders in the company, they may have an interest in its ultimate disposition. Against the latter, as a corporation, a decree is asked requiring it to convey to the plaintiffs an undivided two-ninths of one thirty-seventh of certain lands, and to account for the proceeds of the lands by it sold subsequently to the conveyance from the railroad company. But the suit as distinctly presents another and entirely separate controversy, as to the right of the plaintiffs to a decree against the individual defendants for such sum as shall be found, upon an accounting, to be due from them upon sales prior to the conveyance from the railroad company. With that controversy, the land company, as a corporation, has no necessary connection. It can be fully determined as between the parties actually interested in it, without the presence of that company as a party in the cause. Had the present suit sought no other relief than such a decree, it could not be pretended that the corporation would have been a necessary or indispensable party to that issue. Such a controversy does not cease to be one wholly between the plaintiffs and those defendants, because the former, for their own convenience, choose to embody in their complaint a distinct controversy between themselves and the land company. When the petition for removal was presented, there was in the suit, as framed by plaintiffs, a controversy wholly between citizens of different States, that is, between the plaintiffs, citizens, respectively, of Minnesota and Indiana, and the individual defendants, citizens of New York, Wisconsin and Massachusetts. And since the presence of the land company is not essential to its full determination, the defendants, citizens of New York, Wisconsin and Massachusetts, were entitled, by the express words of the statute, to have the suit removed to the Federal court. It may be suggested that if the complaint has united causes of action which, under the settled rules of pleading, need not, or should not, have been united in one suit, the removal ought not to carry into the Federal court any controversy except that which is wholly between citizens of different States, leaving for the determination of the State court the controversy between the plaintiffs and the land company. We have endeavored to show that the land company was not an indispensable party to the controversy between the plaintiffs and the defendants, citizens of New York, Wisconsin and Massachusetts. Whether those defendants and the land company were not proper parties to the suit, we do not now decide. We are not advised that any such question was passed upon in the court below. It was not discussed here, and we are not disposed to conclude its determination by the court of original jurisdiction, when it is therein presented in proper form. A defendant may be a proper, but not an indispensable party to the relief asked. In a variety of cases it is in the discretion of the plaintiff as to whom he will join as defendants. Consistently with established rules of pleading, he may be governed often by considerations of mere convenience; and it may be that there was, or is, such a connection between the various transactions set out in the complaint as to make all of the defendants proper parties to the suit, and to every controversy embraced by it—at least, in such a sense as to protect the complaint against a demurrer upon the ground of multifariousness or misjoinder.

In Oliver v. Pratt, 3 How. 411, we said, "it was well observed by Lord Cottenham, in Campbell v. Mackay, 1 Mylne & Craig, 603, and the same doctrine was affirmed in this court in Gaines v. Relf, 2 How. 619, that it is impracticable to lay down any rule, as to what constitutes multifariousness as an abstract proposition; that each case must depend upon its own circumstances; and must necessarily be left, where the authorities leave it, to the sound discretion of the court." We further said that the objection of multifariousness can not, "as a matter of right, be taken by the parties, except by demurrer, or plea, or answer, and if not so taken, it is deemed to be waived;" that although the court may take the objection, it will not do

so unless it deems such a course necessary or proper to assist in the due administration of justice." Story's Eq. Pl., § 530 to 540; Shields v. Thomas, 18 How. 259; Fitch v. Creighton, 24 How. 163. No objection was taken by the defendants in the court below to the complaint, on the ground of multifariousness or misjoinder, and the plaintiff should not be heard to make it for the purpose, or with the effect, of defeating the right of removal. They are not in any position to say that that right does not exist, because they have made those defendants, who were not proper parties to the entire relief asked. The fault, if any, in pleading, was theirs. Under their mode of pleading, whether adopted with or without a purpose to affect the right of removal, accorded by the statute, the suit presents two separate controversies, one of which is wholly between individual citizens of different States, and can be fully determined without the presence of the other party defendant. The right of removal, if claimed in the mode prescribed by the statute, depends upon the case disclosed by the pleadings as they stand when the petition for removal is filed. The State court ought not to disregard the petition, upon the ground that, in its opinion, the plaintiffs, against whom a removal is sought, had united causes of action which should or might have been asserted in separate suits. Those are matters more properly for the determination of the trial court—that is, the Federal court, after the cause is there docketed. If that court should be of opinion that the suit is obnoxious to the objection of multifariousness or misjoinder, and for that reason should require the pleadings to be reformed, both as to subject-matter and parties, according to the rules and practice which obtain in the courts of the United States, and if, when that is done, the cause does not really and substantially involve a dispute or controversy within the jurisdiction of that court, it can, under the fifth section of the act of 1875, dismiss the suit, or remand it to the State court as justice requires.

We are of opinion that, upon the filing of the petition and bond by the individual defendants in the separable controversy between them and the plaintiffs, the entire suit, although all the defendants may have been proper parties thereto, was removed to the circuit court of the United States, and that the order remanding it to the State court was erroneous. The judgment is reversed, with directions to the court below to overrule the motion to remand, and to reinstate the cause upon the docket, and proceed therein in conformity with the principles of this opinion.

Mr. Justice Swayne, while on the bench, participated in the decision of this case in conference, and concurs in this opinion. The judgment now ordered is directed to be entered as of tenth of January, 1881, when the case was submitted in this court.

Mr. Justice MILLER:

I dissent from the judgment and opinion of the court in this case, and am requested to say that the Chief Justice and Mr. Justice Field also dissent.

CORPORATIONS — STOCK — POWER OF DIRECTORS.

GILL v. BALIS.

Supreme Court of Missouri, October Term, 1880.

1. Under sec. 32, Wag. Stat., p. 774, in reference to winding up insurance companies by the superintendent of insurance, which provided that the court or judge might, upon the final hearing, make such orders and decrees as might be useful in winding up the affairs of the company, *held*, that the court was authorized to order the receiver to bring an action in his own name against parties liable in any way on account of subscriptions to the capital stock of the company.

2. A board of directors of an insurance company passed a resolution to the effect, that all stockholders who would pay five per cent. on their respective shares of stock and surrender their stock certificates, should have the privilege of retiring from the company and withdrawing their stock notes: *Held*, that the defendants who had complied with the terms of the resolution were not released from liability as stockholders, the facts showing that such release would so diminish the assets of the corporation as to operate as a fraud on its creditors.

3. The directors having power to manage the affairs of the corporation only in the prosecution of its business in making contracts of insurance, which did not authorize the directors to increase or diminish the capital stock, or to change the fundamental organization of the company, the resolution is also assailable on the ground of want of power in the directors to pass it.

4. Nor is the liability of the defendants affected by the fact that, notwithstanding their retirement from the company under the resolution with their share of the assets, the unpaid stock-notes of other stockholders who did not retire were sufficient to pay all creditors and that they could not complain.

Appeal from Circuit Court of Jackson county.

Black, Hall & Pollard for appellants: *J. Brumback* and *T. Gill* for respondent.

NORTON, J., delivered the opinion of the court:

The superintendent of the insurance department, on the 24th of March, 1871, instituted a suit in the Circuit Court of Jackson county, against the Kansas City Fire & Marine Insurance Company, the purpose of which was, among others, to enjoin it from carrying on its business as an insurance company and to wind up its affairs. On the 9th day of August, 1871, a decree was rendered in same cause, enjoining and restraining said company from conducting business, and with a view to wind up its affairs. J. C. Slavens was appointed receiver, and was directed to take possession of all the assets and property of every nature and description, including moneys and all books, records and papers belonging to

said company. On the 10th day of May, 1872, said Slavens tendered his resignation as receiver to said court, which was accepted, and on same day said court, by its order and decree, and in furtherance of its purpose of winding up the affairs of said company, appointed Turner A. Gill, the plaintiff in the present suit, receiver and devolved upon him the performance of all duties required of the former receiver, Slavens. By the further order of said court, made in June, 1873, the said receiver, Gill, was required and directed to join in an action prosecuted in his own name, all parties liable in any way for and on account of subscriptions to the capital stock of the said insurance company, now unpaid, and for balances unpaid on stock or subscription therefor. In obedience to this order plaintiff Gill, as such receiver, instituted the present suit in his own name against all the defendants as stockholders of said company for the purpose of recovering forty per cent. of the par value of each share of the capital stock of said company. The trial of the cause resulted in a judgment for the plaintiff from which the defendants prosecute their appeal to this court.

The principal grounds of error relied upon by the defendants as touching the merits of the cause are, first, that the plaintiff, as receiver, could not institute or maintain a suit in his own name; and second, that if he could do so, they were in no way liable as stockholders, each of the defendants claiming exemption from liability as such, by reason of their having surrendered their stock to said company, whereby they insist they ceased to become stockholders thereof. It will be observed that the receiver in this case derives his power and right to sue from an order of the Jackson County circuit court; and the question presented, whether or not he can maintain this suit in his own name, is dependent upon a construction of section 32, page 772, Wag. Stat. The above section is found in a law entitled, "Insurance," which, among other things, provides for the creation of an Insurance Department, which shall be charged with the execution of all laws in relation to insurance and insurance companies in this State; and also provides for the appointment of a superintendent of the insurance department as the chief officer thereof. Section 32, *supra*, of this law, makes it the duty of the superintendent, when upon an examination of the affairs of any insurance company, it shall appear that such company is insolvent, or that its condition is such as to render its further proceedings hazardous to the public, to file in the office of the circuit court of the county in which it has its principal office or place of business, a petition setting forth the condition of the company and praying for a writ of injunction to restrain said company, in whole or in part, from further proceeding in its business. At any time after such petition is filed, the court in which it is pending is charged with the duty of appointing agents or receivers to take possession of the property of said company; and upon final hearing, with the further duty of making such orders and decrees as may be needful to suspend, restrain and prohibit the further continuance of the business of said company, or any part thereof, or for the dissolution of the company and the winding up of its affairs.

By virtue of this section, when the superintendent of the insurance department files his petition, the court or judge may, upon inspection of the petition, before answer filed or any hearing is had upon the merits, appoint a receiver to take charge of the property of the delinquent company; and if no other power than this had been conferred upon the court, the position taken by appellants, that the receiver could not prosecute a suit in his own name for the recovery of a debt due the company, would be maintainable.

But the section goes further, and authorized the court, on a final hearing, to make such orders and decrees as may be needful "in winding up the affairs of such company."

It is difficult to conceive how the court could perform the duty enjoined upon it of winding up the affairs of the company, if it could not employ agencies to enforce the collection of the debts owing to said company.

The settlement or winding up the affairs of a delinquent corporation can only be accomplished by the application of its assets to the payment of its debts, and the distribution to the stockholders of what may remain after the debts are paid. Ordinarily before the assets, when they consist in property and of debts due the company, can be thus applied, it is necessary to convert the property into cash and to collect the debts; and until this is done, its affairs can not be settled, and the duty enjoined upon the court of winding up its affairs would remain unperformed.

The duty of settling up the affairs of the company being thus devolved upon the court, no reason is perceived why it might not (without any statutory provision), resort to such methods as would enable it to perform the duty. But we think that section 32, *supra*, sets this question at rest by expressly authorizing the court to make all orders and decrees needful to winding up its affairs. The statute invests the court in which the proceeding is pending with the power to determine the necessity of the orders and decrees it may make in respect to the end to be attained; and if, in order to the attainment of the end, it appears to the court that a necessity exists for the collection of debts due the company, and if, acting upon that necessity it does order and direct a receiver, its own officer, to institute suits in his own name for that purpose, we would not be authorized to review its action in that respect, unless the power thus exercised was a gross and palpable abuse of it, and in no aspect of the case calculated to accomplish the winding up of the affairs of the company.

The question is not as to the power of the receiver to sue in his own name, but as to the power of the court charged with the duty of

winding up the affairs of a corporation to make such orders as in its judgment are necessary to enable it to perform the duty enjoined. This question the statute settles by expressly giving such power to the court, and to deny that it possessed it, would be to nullify the statute.

The making of an order in terms dissolving the corporation, is not a condition precedent to the exercise of the power given to wind up its affairs, since the defendant corporation in the suit instituted by the superintendent of the insurance department for the purpose of dissolving it and winding up its affairs, withdrew its answer to the petition, and suffered judgment to go by default.

2. Defendants base their claim of exemption from liability as stockholders on a certain resolution passed by the board of directors on the 17th of February, 1871, to the effect that all stockholders who would pay five per cent. on their respective shares of stock, and surrender their stock certificates to the company, should have the privilege of retiring from the company and withdrawing their stock notes. Defendants claim that they complied strictly with the above resolution, and that, by reason of such compliance, they are released from liability as stockholders.

It is, on the other hand, insisted that the passage of said resolution by the directors was *ultra vires*, and for that reason void, and that it was also fraudulent as to creditors and stockholders.

A solution of this question can only be reached by reference to the facts found by the referee to whom the case was referred. It appears from his report that the capital stock of the company was $400,000, of which $255,250, had been subscribed, and on which only ten per cent. had been paid, and the remainder secured by the stock notes of the respective share-holders; that after the resolution of February, 17, 1871, stockholders, among whom the defendants are embraced, surrendered to the company certificates of stock amounting to $167,200, after paying five per cent. thereon, and received, therefor, from the company their stock notes given to secure the payment of stock respectively subscribed for by them to the amount of $150,400. The only stock remaining after their surrender amounted to $88,000, on which there was owing not to exceed $81,000, only $41,760 of which, the referee finds, was collectable; that at the time the resolution was adopted according to the report of the finance committee of said company, the company had lost $48,250, and the liabilities of the company, other than capital stock, amounted to $32,121.27, including a reinsurance fund estimated at $10,000, which estimate the referee finds to be $5.621.37 less than it ought to have been. In the report of this committee, no account was taken of $350,000 of outstanding policies and liabilities. The referee further finds that on the 7th of February, 1871, the superintendent of the insurance department entered, through an expert, upon an examination of the condition of said company, who, on the 14th of February, three days before the passage of the resolution under which defendants claim exemption, reported to the superintendent that the condition of the company was such as to render its further proceeding in business hazardous to the public and those holding its policies. The referee finds further, "That at the time of the passage and adoption of said resolution, the affairs of said company were in a bad, unsound, unsafe condition, and in such a state that stockholders of said company were liable to lose heavily; and said directors also then each and all knew of this beforementioned examination of the affairs of the company caused to be made by said superintendent of the insurance department, and that said superintendent would probably file a petition praying for an injunction to restrain said company in whole from further proceeding with its business, and wind up its affairs; and they also knew that said company had failed to make the report to the insurance department required by law, and to comply with the law governing it and its business in many respects. That said resolutions were never ratified or adopted by the stockholders of said company." The referee further finds that at the time of the passage of the resolution excluding the statement held by the company, the remaining assets amounted only to $2,000.

In the light of the above facts, we can not see how the action of the board of directors, in the passage of the resolution of February, 1871, can be upheld. Casting out of view liabilities which might come against the company in consequence of the $350,000 of outstanding policies, and taking the estimate of its liabilities to be $32,121.27, as reported by the finance committee, if all the stockholders had complied with the terms of the resolution by paying five per cent. of their stock notes and surrendering their stock and receiving in return therefor their stock notes, constituting all the assets of the company except $2,000, and the five per cent. thus paid in on the $255,250, amounting to $12,762.50, the spectacle would be presented of a company with liabilities amounting to $32,121.27, with no one responsible for the payment of the balance of $17,358.77, which would be remaining after the application of the $12,672.50, and $2,000 of its assets to the payment of such liabilities. A resolution which embraces in its scope such a result, can neither be maintained on principle nor authority. It is no answer to this to say that but two-thirds of the stockholders availed themselves of the avenue of escape from liability provided in the resolution. Its validity is to be tested by the fact that under its terms, all the stockholders might have escaped liability, taking with them all the assets of the company, amounting to $230,780, except $2,000, and putting in the treasury in lieu thereof $12,722.50 in money with which to pay liabilities amounting to $32,121, for the payment of which all stockholders would have been ratably bound previous to such withdrawal. If such withdrawal of all would have operated as a fraud in law—if not in fact—on the creditors, so the withdrawal of a part

would likewise, *pro tanto*, have the same effect.

The resolution in question, never having been ratified nor sanctioned by the stockholders, is also assailable on the ground that the directors had no power to pass it, inasmuch as by its operation the capital stock was diminished from $255,250 to $88,000. The directors had only the general power of managing the affairs of the company in the prosecution of its business, and its business was to make contracts of "insurance against loss or damage by fire on land and water on any description of property or merchandise." Such powers do not authorize the directors either to increase or diminish the capital stock, or to change the fundamental organization of the company. The case of Railroad Company v. Alberton, 18 Wall, 233, fully sustains the above proposition, where it is held that changes in the extent of the constituency or membership of a corporation, involving the amount of its capital stock, are necessarily fundamental in their character, and cannot, on general principles, be made without the express or implied consent of the members. "A change as respects the constituency or capital and membership of a body corporate, being fundamental and next in importance to the purposes and objects of the corporation, without the consent of the stockholders," would be to make them members of an association, in which they never consented to become such. It would change the relative influence, control and profit of each member. If the directors alone could do it, they could always perpetuate their power. Their agency does not extend to such an act, unless so expressed in the charter." The case of Upton, Assignee, v. Tribilcock, 1 Otto, 45, is equally emphatic in condemnation of the right of directors, to limit the liability of stockholders as to unpaid stock, and pronounces such a transaction void. Justice Hunt, speaking for the court, uses the following language: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund of which the directors are trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and can not be disregarded. Its violation will not be undertaken by any just minded man and will not be permitted by the courts. The idea that the capital of a corporation is a foot-ball to be thrown into the market for purposes of speculation, and that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention. Equally unsound is the opinion that the obligation of a subscriber to pay his subscription may be released or surrendered to him by the trustees of the company. This has often been attempted, but never successfully. The capital paid in, and promised to be paid in, is a fund which the trustees can not squander or give away. They are bound to call in what is unpaid, and carefully to husband it when received."

Sec. 201. Thompson on Stockholders, is an authority to the effect that the American courts have steadily annulled all arrangements between corporations and their stockholders, whereby the latter were sought to be released from liability to creditors. The same author, in the following section, refers to the case of Dorr v. Stockdale, 19 Iowa, 269 (which counsel for defendants have cited us as sustaining the resolution of February 17, 1871), as the only American case showing a departure from the rule laid down by him. It is, however, urged by counsel, that, notwithstanding the retirement of defendants from the company under the resolution of the directors with $150,000 of its assets, the unpaid stock notes of other stockholders who did not retire were sufficient to pay all creditors, and that no wrong was done by virtue thereof to creditors, and that they could not therefore complain. In the case of Bedford R. Co. v. Bowser, 48 Penn. St. 29, a similar question to the one here presented was considered. In that case, two hundred and sixty-six subscribers to the stock of a railroad company claimed to be released by virtue of an order of the board of directors authorizing the cancellation of their stock, and the court instructed the jury that if the company had sufficient assets to pay their debts, such order was valid, and the cancellation of the stock under it released the defendants. The court held that this instruction was erroneous, and remarked, in passing upon it, that the directors of the company then in office were its agents with limited power, the extent of which the defendant was bound to know. Their duties were to conduct the affairs to the furtherance of the ends for which the company was created. They had no right to give away any of its funds, or to deprive it of any of its means to accomplish the full purpose for which it was chartered. The creditors were not the only persons who had interests at stake. The stockholders who had paid their subscriptions or bought their stock * * * were at least equally interested. So in the case of Spackman v. Evans, L. R. 3 H. L. 171, where a kindred question came before the court, Lord Cranworth remarked, that a stockholder might well object to the relieving of other stockholders and say "I became a stockholder, relying on the names of those who were engaged with me in the partnership; I delegated the management to certain directors with defined powers and duties; it was part of the stipulation of the deed of partnership, that none of my fellow-stockholders should quit the partnership except by substituting in his place some other person approved by the directors. This was, I thought, sufficient security to me, that in the event of my being called on by a creditor who, having recovered judgment against the company, should proceed to enforce payment against me, I had solvent partners from whom I might obtain contribution; and now I find that without authority you (the directors) have taken on yourselves to enable several of my partners to withdraw from the partnership, by a proceeding

which I never authorized." It follows, we think from the above authorities, that the resolution of the board of directors of February 17, 1871, whether it be considered with reference to its bearing on the creditors of the company or its stockholders, or on both, can not afford the protection which defendants claim under it. The other questions presented by counsel we have not considered, not deeming them material to a proper disposition of the case.

Judgment affirmed, in which all concur.

FRAUD—EQUITY—ILLEGAL CONSIDERATION.

McQUADE v. ROSECRANS.

Supreme Court of Ohio, February, 1881.

Where the consideration of a mortgage is an entirety, if a part of it is illegal, the taint attaches to the whole transaction. Thus a mortgage given to secure double the amount of money loaned, with intent to defraud creditors, a court of equity will not aid in its foreclosure. Such defense may be made by the mortgagor or any party claiming under him.

Error to the District Court of Scioto County.

The action below was brought by Sylvester H. Rosecrans against Elizabeth McQuade, and John McQuade, administrator *de bonis non* of Hugh Reilly, to foreclose two mortgages executed by said Reilly and his wife, Elizabeth, now the plaintiff Elizabeth McQuade, to secure the payment of certain promissory notes, amounting in the aggregate to $1,600, executed by Hugh Reilly and delivered to Emanuel Thinpoint, the defendant's testator, in the years 1857 and 1858. Said Elizabeth was sole heir of said Hugh Reilly. The answer averred, among other things, that at the time said Hugh Reilly executed the said notes and mortgages, he was in embarrassed circumstances, and involved in debt beyond his means to pay, without resort to the real estate mortgaged; and that said mortgages were executed by said Reilly, and received by said Thinpoint, in double the amount actually loaned, for the purpose of placing the property mortgaged beyond the reach of the creditors of Reilly.

The reply admitted that the consideration of said notes, secured by said mortgages to the amount of $800, was never paid to said Reilly by said Thinpoint, but was a trust fund created by said Reilly in favor of said Elizabeth, who, after the death of said Hugh Reilly, and before said suit was commenced, intermarried with John McQuade. The reply denied that said conveyances were made with intent to defraud the creditors of said Hugh Reilly. On the trial in the district court to which the cause had been appealed, the plaintiff in error called as a witness Cornelius McCoy, who stated that he was acquainted with Hugh Reilly in his lifetime, the former husband of the said Elizabeth McQuade, and counsel for defendants therein propounded to the witness the following question, viz.: "What, if anything, do you know as to the pecuniary circumstances of Hugh Reilly, prior to his death?" To which question the plaintiff, by his counsel, objected, and the court sustained said objection, and the witness was not permitted to answer said question.

Counsel for defendants then proposed and offered to prove by said witness, and other witnesses, that at the time of the execution of said notes and mortgages sued upon, the same were given for just double the amount of money actually loaned. That the said Hugh Reilly was being sued by various creditors, and was in embarrassed circumstances, and wholly insolvent, which facts were well known to both said Hugh Reilly and the said Emanuel Thinpoint, and that the object on the part of both said Reilly and Thinpoint in taking the notes and mortgages for double the amount loaned, was to cover up and protect said real estate so mortgaged from being levied on and sold in payment of the debts due to said creditors; that, in fact, the giving and taking of the said notes and mortgages did operate as a fraud on said creditors; but the court ruled that the said evidence, and each part thereof, was incompetent; that the contract, as between the said Emanuel Thinpoint and Hugh Reilly must be regarded as executed, and that the defendant, Elizabeth Reilly, was not in a position to raise the question of fraud upon the creditors of the said Hugh Reilly, and thereupon excluded the testimony offered.

Judgment having been given for the plaintiff below, the exclusion of said testimony is here assigned as error.

BOYNTON, C. J., delivered the opinion of the court:

We think the court erred in excluding the evidence offered to show that the object of the mortgagor, in giving the mortgages sued on to secure double the amount borrowed, and of the mortgagee in receiving the same, was to defraud the creditors of the mortgagor. Sec. 97 of the Crimes Act (1 S. & C. 429) makes it a penal offense, punishable by fine and imprisonment, for any person to make any grant or conveyance with intent to defraud his creditors of their just demands. The object of the testimony offered and rejected was to show that a part of the consideration of each of the notes the mortgages were given to secure, was illegal, and consequently that the mortgages were void. If a part of the consideration of each note was illegal, the effect would be the same as if the entire consideration were illegal, and such effect would be to render the mortgages void. If any distinct note, that either mortgage was given to secure in part, was not tainted with the fraudulent purpose to defraud the maker's creditors, no doubt, equity would follow the law and enforce to that extent the mortgage security; but where a

part of the consideration, whether large or small, is affected with the fraud, the case falls within the operation of the principle stated and affirmed in Widoe v. Webb, 20 Ohio St. 431. Hence, the testimony offered was clearly competent, unless the view is correct which the district court seemed to have taken, namely: That the contract, evidenced by the mortgages, was fully executed between the parties. That such is not the character of the contract, in the view of a court of equity, is apparent from a moment's reflection. In equity, a mortgage is but a chose in action, given to secure the performance of some act—usually the payment of money.

Where anything remains to be done to carry into effect the intention of the parties, and which can only be accomplished through the aid of a court of equity, where one of the parties refuses to perform the stipulations which he has agreed to perform, the contract is executory. A mortgage, being conditioned for the payment of a sum of money, or the performance of some other act, if the money is not paid, or the act performed, and the equity of redemption is sought to be foreclosed, the active aid of a court of equity is required. The payment of the mortgage debt, or the performance of the condition, by foreclosure, can be secured in no other way.

And this aid is always and uniformly denied, when sought to enforce a contract, the consideration of which is illegal. In such case the maxim applies, *in pari delicto potior est conditio defendentis*, not because the defendant's rights are superior to the plaintiff's, but because the court will leave the parties in the position where they have placed themselves. The case of Raguet v. Roll, 7 Ohio, 77, was a *scire facias* on a mortgage to charge lands with execution. The mortgage was given to secure the payment of the sum of $500, the consideration of an agreement to suppress and prevent a criminal prosecution. The relief sought was denied, and expressly upon the ground that the consideration of the mortgage was tainted with illegality. That case, in principle, is not distinguishable from this, and is decisive of the question now under discussion.

The remaining point is, that because Mrs. McQuade signed the mortgages she can not allege that the consideration of the same was illegal, either in whole or in part. This question was settled in Goudy v. Gebhart, 1 Ohio St. 262, and was also directly involved in Raguet v. Roll. The rule is, that in so far as the contract is executory, the defendant, although *in pari delicto*, or any one acquiring an interest in the property affected by the contract sought to be enforced, may set up the illegality of its consideration in defense. No one is allowed to set up his own fraud or criminality to defeat an innocent party; but where both parties are *particeps criminis*, the fraud may be set up and proved by either party, when the contract is sought to be enforced against him.

Judgment reversed and cause remanded.

ABSTRACTS OF RECENT DECISION.

SUPREME COURT OF THE UNITED STATES

October Term, 1880.

CONTRACT—PART PERFORMANCE.—In 1872 the City of Chicago and Cook County, in which it is situated, agreed to erect upon a certain lot a building for public county and city purposes, for a court-house, offices, etc. One-half the lot was to be occupied and built upon by the city, the other by the county, and the general exterior design of the two portions of the building was to be uniform, but each of the parties was to engage its own architect, etc. In June, 1875, the county engaged Mr. Egan as its architect; and in August of the same year, the city council elected Thomas Tilley, the defendant in error, its architect, the only evidence of the contract between him and the city being an order of the city council prescribing his duties and fixing his compensation at the sum of $37,500, being three per cent. on the whole sum proposed to be expended by the city upon the building, and this sum it was stated, should be in full for all his services in the matter. Tilley accepted the office and prepared plans, etc., partly performing his share of the contract. There was a difficulty about harmonizing the plans of the city and county, a joint meeting of the respective building committees, with their architects, an attempt to get up a compromise plan. The proof "tends to show" that Egan's compromise plan was adopted by the joint meeting; but in January, 1876, the city council, in effect, adopted Tilley's compromise plan. He went on with his work, preparing plans, tracings, and working drawings; was ready at all times to proceed and fulfill his part of the contract, but the city would not permit him to do so; and in August, 1878, he brought this suit to recover compensation for the work he had done, claiming, however, the contract price, $37,500. There was a verdict in his favor for $13,000. The City of Chicago brought up the case on writ of error. It is *held*, (1), that it was no part of Tilley's engagement under the contract, to procure the concurrence of the county commissioners in his designs for the exterior of the building; (2), that, as the plaintiff having performed a part of his contract according to its terms, and having been prevented from performing the residue by the failure of the other party to do its part, may receive a compensation for the work actually performed; (3), that there was no error in the charge of the court, and the judgment is affirmed. In error to the Circuit Court of the United States for the Northern District of Illinois. Opinion by Mr. Justice WOODS.—*City of Chicago v. Tilley*.

PRACTICE—APPEALS—SECOND APPEALS—RECEIVER.—In this case, after the suit of Hinckley v. Railroad Company (100 U. S. 153), had been settled upon a mandate from this court, and the

money found due had been paid, Hinckley went into the State court, procured the reinstatement of the suit, and was allowed, as receiver, $24,000, although he had been previously allowed $10,000. He then filed an intervening petition in the circuit court, asking that that amount be allowed him out of the fund in that court belonging to the Morton suit. This was refused, and, from the order to that effect, which was final on the intervening petition, this appeal was taken. *Held*, that this court has clearly jurisdiction of this case. Second appeals have always been allowed to bring up proceedings subsequent to the mandate, and not settled by the terms of the mandate itself. The motion to dismiss is denied. The motion to affirm, however, is granted because the compensation to the receiver was settled on the former appeal. Affirmed. Appeal from the Circuit Court of the United States for the Southern District of Illinois. Opinion by Mr. Chief Justice WAITE—*Hinckley v. Morton*.

PRACTICE — PUBLICATION — REMOVAL OF CAUSES—LIABILITY OF TOWNSHIP ON BONDS.—The township of Harter, Clay County, Illinois, in 1870, issued certain bonds under authority of acts of the State legislature. These bonds were issued as a substitute for a donation of money previously voted to the Southeastern R. Co. of Illinois, by virtue of the charter of that railroad company. Act of February 25, 1867. The donation had been authorized by a vote of the people, and the substitution of bonds for the payment of money was made, was also approved by an election held May 20, 1870, this election being in pursuance of an act of February 24, 1869 (Priv. Laws Ill. vol. 3, p. 310), which provided that in Wayne and Clay Counties townships that have voted donations may determine by a vote whether they will issue bonds or not in payment of donations already voted, and that it is not necessary to vote again on the donation. The bonds in question were regularly issued and registered, all due formalities being complied with. In 1877 this bill was filed by citizens of the township against its officials and the "unknown holders" of the bonds; publication was made as to the latter, the former made no defense, and by final decree May 1, 1879, the bonds were declared invalid, and a perpetual injunction awarded. On the 17th April, 1880, Kernochan, the holder of the bonds and coupons, appeared and, at his instance, the cause was re-docketed and upon his petition removed to the circuit court of the United States, he being a citizen of Massachusetts, and complainants citizens of Illinois. Upon hearing in the circuit court the bill was dismissed, and the injunction which had been granted by the State court, dissolved. It is *held*, 1. That there is nothing irregular in the way in which the cause was re-docketed and the decree opened in the State court. Kernochan having appeared within one year after the decree had been passed, and not having been served with process, was entitled to be heard touching the matters of the decree as if no decree had been made. 2. That after his appearance the suit was removable to the Federal court, as it would have been before decree had he been duly summoned; that it was a suit in which there was a single controversy, a citizen of Massachusetts being on one side, and citizens of Illinois on the other. Removal Cases, 100 U. S. 457. 3. That the bonds in question were regularly issued in lieu of the donation already voted by the taxpayers of the township. 4. That the donation was valid, having been voted in strict compliance with the law. 5. That the substitution of bonds for the donation was done in accordance with the law. 6. That neither the act of February 25, 1867, nor that of February 29, 1869, under which this liability was incurred, was in violation of the Constitution of the State. 7. That the fact that the bonds were voted to one railway company and delivered to another does not impair their validity, because the latter company succeeded to all the rights and duties of the former. Decree affirmed. Appeal from the Circuit Court of the United States for the Southern District of Illinois. Opinion by Mr. Justice HARLAN.—*Township of Harter v. Kernochan*.

PRACTICE—APPEAL—MANDATE.—This was an appeal in a case decided in the Supreme Court, and sent down to be executed by the circuit court. By the mandate, Humphrey was directed to execute a deed with certain specific covenants. This he declined to do, but filed a bill of "supplement and review," and upon hearing, was adjudged in contempt for not executing the deed. It is *held*, affirming Stewart v. Salomon, 94 U. S. 361, that "we will not entertain an appeal from a decree entered in exact accordance with our mandate on a former appeal, that the decree entered below in the present case, followed the mandate in every particular and was in effect ours." Suit dismissed. Appeal from the Circuit Court of the United States for the Eastern District of Michigan. Opinion by Mr. Chief Justice WAITE. *Humphrey v. Baker*.

SUPREME COURT OF KANSAS.

April, 1881.

CONTINUANCE—DUE DILIGENCE—CONDITIONAL SETTLEMENT.—1. Where two persons are sued as partners, and one of them, who is the head of the firm, voluntarily leaves the State and goes beyond the jurisdiction of the court, without leaving any deposition containing his testimony in the case, and then shifts from place to place so rapidly that his deposition can not be taken, and is thus absent when the case is called for trial, although it was, up to that time, expected that he would return in time for the trial, and be present at the trial, and no reason is given why he has not returned, and his testimony is material in the case, and the defendants make an application for

a continuance on the ground of the absence of his testimony, and in their affidavits set forth the foregoing facts, and the court overrules the application: *Held*, not error, that no sufficient diligence was exercised to procure the absent testimony. 2. Where a settlement is to be final upon condition that O shall say a certain thing, and not final if he should say otherwise; and afterward O makes his statement with reference to the matter, and the plaintiff then commences an action, in which action he wishes to avoid the settlement, it is not error for the court to admit evidence to show what O in fact said, after the settlement, upon the subject. 3. Where a settlement is final, except as to one particular, it is error to treat it as not final in other particulars. Modified. Opinion by VALENTINE, J.—*Tucker v. Garner.*

PARTNERSHIP IN ISSUE — EVIDENCE — PRACTICE.—1. Where two persons are sued as partners, and the question of partnership is put in issue, the statements of one of such persons in the absence of the other, is not evidence against the other that they are partners. 2. Where an alleged fact is not only controverted by the adverse party, but is an important fact in the case, it is error for the court in charging the jury to assume the existence of such fact, as one of the facts proved in the case. 3. Where two trials have been had in a case, and the plaintiff testified at both, and professed to testify in full at both, and at the second trial testified that his testimony at both, with respect to certain particulars, was substantially the same: *Held*, under the circumstances, that evidence might be introduced to show that, with reference to said particulars, concerning which he testified at his second trial, he gave no testimony at the first trial. 4. Where an objection to evidence is made on grounds stated as follows: "On all the grounds ever known or heard of," the objection should not be entertained by the court. Reversed. Opinion by VALENTINE, J.—*Johnston v. Clements.*

PROMISSORY NOTE—INDORSEMENT AS GUARANTOR—NOTICE.—Where W, who apparently has no connection with the promissory note in question, sells and assigns the same before due, and indorses his name thereon in blank; and he is the first and only indorser of the note; and afterwards he is sued thereon by the person to whom he sold the same, and he sets up the following defense: That he sold and assigned the note before due, and indorsed the same as guarantor, and that at the time he sold the same, and at the time that the same became due, the maker thereof was perfectly solvent, and the note could have been collected from him by the exercise of reasonable diligence; but that afterwards the maker became insolvent; and that no notice was given to the defendant of the non-payment of the note until nearly four years had elapsed after the same became due, and was then given at a time when the note could not be collected from the maker because of his insolvency: *Held*, that the defens was sufficient; that want of due dilligence on the part of the guarantee will discharge the guarantor to the amount of the loss sustained. Reversed. Opinion by VALENTINE, J.—*Willard v. Beary.*

NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—1. In an action upon a note against four persons, the defense of the two contesting the note, was that their names had been forged to the instrument. Judgment was entered against them on the evidence offered upon the trial. At the succeeding term after the decision, a petition was filed for a new trial, on the ground of a newly discovered evidence. All the evidence newly discoverd was incompetent, except the statements of one H, living in an adjoining county, "That he had long and extensive experience in the banking business, and a great deal of practice in the examination of signatures and forged papers, and that he could readily detect a forgery; and further, that being well acquainted with the signature of the contesting defendants, upon full examination of the note sued on, in his judgment, the names of the defendant on the note were forgeries." *Held*, no error in sustaining a demurrer on the ground that the petition did not state facts sufficient to entitle the applicant to the relief asked for. A new trial ought not to be granted on incompetent and inadmissible evidence, nor, if the only object of the newly discovered evidence is to produce the evidence of a single expert as to the genuineness of the signature to a written instrument. Affirmed. Opinion by HORTON, C. J.—*Manwell v. Turner.*

SUPREME COURT OF WISCONSIN.

April 19, 1881.

EXTENSION OF CREDIT UPON A NOTE—DISCHARGE OF SURETY.—1. An agreement, upon sufficient consideration, to extend the time of payment of a note "until after threshing," *held*, to be for a time sufficiently definite to give it validity, and work a discharge of the non-assenting surety. 2. The consideration for the alleged extension was a second note then given by the principal promisor in the first note; such second note was usurious, and it does not appear that it has ever been paid. *Held*, that there was a valid extension. 3. It seems that where A makes his note payable to X or bearer, and procures B to sign it for his accommodation, and for the purpose of enabling him to negotiate said note to X, and afterwards A negotiates it in fact to Y for the payment of a different debt, this is a fraud upon B, which, if known to Y when he took the note, will prevent a recovery thereon against B. Opinion by LYON, J.—*Moulton v. Pasten.*

NEGLIGENCE—DEFECTIVE SIDEWALK—EVI-

DENCE—PLEADING—1. In an action for injuries to the person from a defective sidewalk, where the complaint alleges that the walk was "in a dilapidated and dangerous condition, the boards or planks * * * * being old and decayed, and not being nailed or in any manner properly fastened to the timbers across which they were laid," there was no error in admitting evidence of defects in the original construction of the walk; and this, though it was constructed by private persons and not by the city. 2. Where a complaint for injuries to the person alleges generally that plaintiff was unable, by reason of such injuries, to pursue his lawful business, that is sufficient to admit evidence of the particular business and the damages resulting from its interruption; and if defendant wishes to be more fully informed by the complaint as to what plaintiff's business is, the remedy is by a motion to make more definite and certain. 3. Whether a midwife is a person practicing "physic or surgery," within the meaning of sec. 1436, R. S., so that she can not collect by suit fees for her services without having a diploma as there provided, is not considered; as in either case it is a lawful profession, and actual loss from interruption to the practice thereof, caused by personal injuries, may be shown to enhance damages. 4. The court permitted the defendant city, on cross-examination of the person injured, to show that she had some difficulty with the city about a sidewalk tax, but refused to allow further cross-examination as to the particulars of such difficulty. *Held*, no abuse of discretion. Opinion by TAYLOR, J.—*Luck v Ripon.*

INJUNCTION — CONTEMPT. — On a complaint which showed merely that the defendants, a city and its employees, were interfering by physical force with the construction of a railroad bridge by the plaintiff, a court commissioner ordered them to show cause before the circuit judge on a day named, why they should not be restrained from interfering with said bridge, according to the prayer of the complaint; and he also made a temporary order that defendants, their agents, etc., "desist and refrain from in any way or manner interfering with the construction of said bridge by plaintiff, and from cutting the piles being there driven, or doing any act of any kind to hinder, delay, impede, impair or prevent the contractor and his employees from performing said work, and from doing any act to hinder, delay or prevent the building of the proposed line of railway," etc. On the next day, the same court commissioner, on application of the city by its attorney, and upon the answer of the defendants, setting up a counterclaim for an injunction restraining plaintiff from building said bridge, etc., ordered plaintiff to show cause before the circuit judge on the day previously named, why it should not be so enjoined, and also made a temporary order restraining plaintiff in the meantime from building the bridge. *Held*, that, construing strictly the first injunctional order, above recited, in view of the matters alleged in the complaint upon which it was founded (and also in view of the second order made by the same commissioner), it must be understood as restraining defendants only from forcible interference with the construction of the bridge; and the city's attorney was not guilty of any contempt in obtaining the second injunctional order. Opinion by LYON, J.—*Wisconsin Central R. Co. v. Smith.*

JURY—MURDER TRIAL—SEPARATION—BAILIFF.—1. During a trial for murder in the first degree, which lasted several days, several of the jurors, at different times, were permitted to separate from their associates and go to their homes in the city where the court sat, or to a hotel, or other public place, for the purpose of changing their clothing, inquiring after their mail, etc., but in each instance the juror was attended by an officer, who swears that during such separation, neither he nor any other person had any conversation with the juror about the cause, nor was there any such conversation by other persons in the juror's presence. Nothing was shown to discredit these statements. The affidavits of the jurors themselves were not procured. *Held*, that there was no error in refusing to set aside a verdict of guilty on account of the separation of the jurors. Keenan v. State, 8 Wis. 132, distinguished. 2. The mere fact that the officer in charge of the jury was permitted by the judge to remain, and did remain, in the room with the jury, while they were deliberating upon their verdict, is no ground for a new trial. Opinion by COLE, C. J.—*Crockett v. State.*

GARNISHEE'S COST.—An insurance company garnished in an action as owing moneys on policies to the principal defendant, admitted by its answer, its liability on the policies, but stated that they were made payable to certain other persons named, "as their interest might appear," and that it was unable to determine to whom the moneys were due; and it offered to pay the money into court, or to any person to whom the court should direct it to be paid, and asked to be allowed to deduct its costs out of the fund. No issue being made on the answer, the court, besides directing the persons therein named to be made defendants in the proceeding, ordered the garnishee's costs to be paid by the plaintiff. *Held*, on plaintiff's appeal, that it was error not to order payment of such costs out of the fund. Opinion by COLE, C. J.—*Baker v. Lancashire Ins. Co.*

RECENT LEGAL LITERATURE.

KANSAS REPORTS. Reports of Cases argued and determined in the Supreme Court of the State of Kansas. A. M. F. Randolph, reporter, vol. 24. containing cases decided at the July term, 1880, and the January term, 1881. Topeka, Kansas, 1881. Geo. W. Martin, Kansas Publishing House.

Among the matters of interest in this volume are the utterances of the court in the case of the State v. Gutekunst (p. 254), on the subject of the limits of professional freedom of discussion in addressing a jury. The remarks are *obiter*, as the case went off on another point, but the court said: "We take this opportunity, however, of calling attention to the duty of the district courts in jury trials to interfere in all cases of their own motion, where counsel forget themselves so far as to exceed the limits of professional freedom of discussion. Where counsel refers to pertinent facts not before the jury, or appeals to prejudices foreign to the case, it is the duty of the court to stop him then and there. The court need not, and ought not, to wait to hear objection from opposing counsel. The dignity of the court, the decorum of the trial, the interest of truth and justice, forbid license in arguments to jurors outside of the proper scope of professional discussion." The court concludes in the words of the opinion in State v. Comstock, 20 Kan. 655: "Courts ought to confine counsel strictly within the facts in the case; and if counsel persistently go outside of the facts in their argument to the jury, then the court should punish them by fine and imprisonment, and if they should obtain a verdict by this means, then the court should set such verdict aside." Very robust and wholesome doctrine, and worthy of general enforcement.

CORRESPONDENCE.

EIGHTH MISSOURI APPEAL REPORTS.

To the Editor of the Central Law Journal:

The authorized reporter of the St. Louis Court of Appeals has just issued from the press the Eighth Missouri Appeal Reports. It contains a list of cases passed upon by the Supreme Court, being cases in which the decisions contained in these reports have been passed upon by the Supreme Court of the State of Missouri. There are forty-one cases in the list, whereof the showing is fifteen reversed and only twenty-six affirmed. And yet there is a proposed constitutional amendment to be voted upon by the people at the next general election, which contemplates making the St. Louis Court of Appeals final in all these cases, except the nine criminal cases, of which four were reversed and five were affirmed. In other words, there are eleven of those reversed cases wherein the errors of the St. Louis Court of Appeals could never be remedied.

It is amusing therefore to observe the note which the apologetic reporter appends to his aforesaid list. He says: "It will be observed by the profession that the Supreme Court in many cases decide an appeal upon grounds other than those which were presented for consideration in the Court of Appeals." This may mean a great deal more than appears on the surface. It may be the outcropping of that irritation with which the reporter contemplate the overthrow, by the Supreme Court, of the decisions of the Court of Appeals, which he is salaried to report, or it may mean that the Supreme Court has taken a wider view in the administration of justice, than was obtained or obtainable in the inferior tribunal. But a member of the profession will observe that the proportion of reversals (15), to the number of affirmations (26), affords startling encouragement to the profession, and to clients to appeal from the decisions of the St. Louis Court of Appeals, and to cause them to relinquish their right of appeal in all civil cases, with great reluctance.

The proposed constitutional amendments ought to be voted down. They furnish no permanent or adequate relief for the over-crowded docket of the Supreme Court, except at the sacrifice of justice, and it is no time to abrogate the time honored maxim, "*Fiat justitia, ruat cœlum.*"

A. W. SLAYBACK.

NOTES.

After a jury had been deliberating several hours the foreman, whose name was Sweet, sent the following note to the judge, whose name was Devine:

Dear Judge Devine,
Please send some wine
And something good to eat.
It's plain to see
We can't agree.
Your obedient servant—SWEET.

——Perhaps the most common mistake of the profession is to try experiments when the client wants certainty. A physician who devotes himself to a special line of practice, making a reputation and a fortune while yet a young man, was asked by a friend the secret of his success. He said: "I can tell you the secret in one word. I study my cases and I never take a case unless I think I can cure it or substantially relieve it. If I cannot, I tell them at once 'I can do nothing for you.'" Some of the greatest reputations at the Bar have been made by the same policy. There are men who always seem to succeed, because they do not allow their clients to go into loosing fights. This is the true identification of counsel with his client's interests.